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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

In the Matter of

Rulemaking to Amend Parts 1, 2, 21 and 25
of the Commission's Rules to Redesignate
the 27.5-29.5 GHZ Frequency Band, to
Reallocate the 29.5-30.0 GHZ Frequency Band,
to Establish Rules and Policies for Local
Multipoint Distribution Service and for
Fixed Satellite Services

CC Docket No. 92-297

Petitions for Reconsideration of the
Denial of Applications for Waiver of the
Commission's Common Carrier Point-to-
Point Microwave Radio Service Rules

Suite 12 Group Petition for
Pioneer Preference

PP-22

To: The Commission

**PETITION FOR RECONSIDERATION
OF THE RURAL TELECOMMUNICATIONS GROUP**

Caressa D. Bennet
Gregory W. Whiteaker

Bennet & Bennet, PLLC
1019 Nineteenth Street, NW
Suite 500
Washington, D.C. 20036
(202) 530-9800

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SUMMARY

Rather than adopting rules designed to ensure that rural telephone companies have economic opportunity to participate in the provision of LMDS, the Commission in fact severely restricted their eligibility to own and operate in-region LMDS systems. These in-region eligibility restrictions violate the plain language of Section 309(j) of the Act by failing to ensure rural telephone company participation and by failing to ensure the rapid deployment of LMDS to rural areas.

Contrary to the Commission's assertion in the LMDS Order, rural telephone companies need not prove that they are the sole providers of a service in order to be eligible to provide such service, or to be eligible for designated entity benefits designed to ensure their participation.

Because the eligibility restrictions are based on the relative overlap of LMDS license area and telephone service area, the restrictions apply fully to rural telephone companies and effectively foreclose a rural telephone company's ability to partition an LMDS license in order to serve the area reasonably related to its telephone service area.

The in-region eligibility restrictions conflict with Congress's goals of providing universal service to rural America.

The Commission's failure to prescribe meaningful performance requirements also violates Section 309(j) of the Act. The Commission's guidelines for "substantial service" are so permissive as to be non-existent. The Commission's reliance on the performance requirements adopted for the Wireless Communications Service ("WCS") is entirely misplaced and inappropriate.

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**PETITION FOR RECONSIDERATION
OF THE RURAL TELECOMMUNICATIONS GROUP**

The Rural Telecommunications Group ("RTG"), by its attorneys, and pursuant to Section 1.429 of the rules of the Federal Communications Commission ("FCC" or "Commission"), respectfully seeks reconsideration of the *Second Report and Order and Order on Reconsideration* ("*Second R&O*") released by the FCC on March 13, 1997, in CC Docket No. 92-297. RTG seeks reconsideration of the *Second R&O*'s lack of provisions to ensure rural telephone company participation in the provision of Local Multipoint Distribution Service ("LMDS") and of the Commission's decision to restrict the ability of rural telephone companies to provide LMDS within their wireline service areas. RTG also seeks reconsideration of the Commission's failure to impose reasonable construction requirements on LMDS licensees.

STATEMENT OF INTEREST

RTG is a group of concerned rural telephone companies who have joined together to promote the efforts of member rural telephone companies to speed the delivery of new, efficient and innovative telecommunications technologies to the populations of remote and underserved sections of the country. RTG's members desire to provide LMDS to customers within their wireline service areas and adjacent markets.

INTRODUCTION

The *Second R&O* fails to satisfy the Commission's Congressional mandate that the FCC ensure rural telephone companies a meaningful opportunity to participate in the provision of new spectrum-based services. The *Second R&O* provides no special benefits to rural telephone companies to ensure a meaningful opportunity to participate in the provision of LMDS. To the contrary, the Commission places a three year restriction on an incumbent local exchange carrier's ("ILEC's") eligibility to own an attributable interest in a 1,150 megahertz LMDS license if the LMDS license area "significantly overlaps" the ILEC's telephone service area.¹ Under the newly adopted rules, an overlap is significant if the ILEC's telephone service area overlaps 10 percent or more of the population of the LMDS license area.² RTG and other representatives of rural America opposed these in-region eligibility restrictions and requested that, at a minimum, the

¹ *Second R&O* at ¶ 160; see newly adopted 47 C.F.R. § 101.1003(a).

² *Second R&O* at ¶ 188. License areas containing significant overlap are generally referred to as an "in-region."

Commission create an exemption from the restrictions for rural telephone companies.³ The Commission without reasoned justifications declined.

As RTG will explain, the imposition of in-region eligibility restrictions on rural telephone companies: (1) violates Section 309(j) of the Communications Act of 1934, as amended (“the Act”); (2) hinders the deployment of LMDS to rural America; (3) frustrates Congressional Universal Service objectives; and, (4) lacks reasoned justification. Accordingly, the Commission should reconsider and revise the *Second R&O*.

I. THE LMDS ELIGIBILITY RESTRICTIONS VIOLATE THE PLAIN LANGUAGE OF SECTION 309(J) OF THE COMMUNICATIONS ACT

Section 309(j) of the Act obligates the Commission to provide economic opportunities for rural telephone companies to participate in the provision of spectrum-based services such as LMDS, and requires the Commission to ensure the rapid deployment of these new services to rural Americans. Section 309(j)(3) requires the Commission to design competitive bidding systems to further these specific goals. Section 309(j)(4) requires the Commission to prescribe regulations ensuring economic opportunity for rural telephone companies and ensuring the “prompt delivery of service to rural areas.”

Despite the directives of Section 309(j), the Commission adopted no special provisions to ensure participation by rural telephone companies.⁴ Instead, rather than providing opportunities for rural telephone companies to participate in the provision of LMDS, the Commission turns the

³ RTG is the successor-in-interest to the Ad Hoc Rural Telecommunications Group (“Ad Hoc RTG”). See, e.g., Comments of Ad Hoc RTG (filed August 12, 1996); Reply Comments of Ad Hoc RTG (filed August 21, 1996).

⁴ *Second R&O* at ¶ 362.

statute completely on its head by imposing a new hurdle to a rural telephone company's ability to participate in new and innovative services. The Commission erects this new hurdle by asserting,

[W]e do not believe that these restrictions, as crafted, will hinder the introduction of LMDS in rural areas. Rural LECs have not made the case that they are the only entities that can provide LMDS in their service areas.⁵

Despite this assertion, there is no statutory or administrative requirement that rural telephone companies demonstrate that they are the only possible provider of a service in order to be eligible to provide the service. Nor is there a requirement that rural telephone companies must prove that they are the only providers of a new service in order to trigger the Commission's 309(j) obligation to ensure meaningful economic opportunity for rural telephone companies to participate in such new service. This new burden is a fabrication of the *Second R&O*, is utterly without legal basis and completely contrary to the plain meaning of Section 309(j).

The Commission misconstrues Section 309(j) so completely that it actually cites the provision as a basis for imposing the eligibility restriction on rural telephone companies. Citing Section 309(j), the Commission states that an in-region eligibility restriction, "best comports with the auction goals of the Communications Act."⁶ The Commission explains:

In particular, these minimal restrictions will promote economic opportunity and competition, and will avoid excessive concentration of licenses by disseminating licenses among a wide variety of applicants.⁷

The Commission's paraphrase of the Act is so grossly incomplete as to be cavalier. The Commission totally omits the next phrase pertaining to rural telephone companies. Section 309(j) requires the Commission to disseminate licenses among a wide variety of applicants

⁵ *Id.* at ¶ 179.

⁶ *Id.* at ¶ 181 (citing Section 309(j)).

⁷ *Id.* at ¶ 181.

“including...rural telephone companies.” The *Second R&O* re-writes the statute to require dissemination among a wide variety of applicants *excluding* rural telephone companies. This re-write is unsustainable and must be revised.

In assessing the propriety of eligibility restrictions, the Commission failed to consider rural telephone companies’ unique position under Section 309(j). The Regional Bell Operating Companies (“RBOCs”) and large independent LECs are not designated entities under Section 309(j). Rural telephone companies are. The *Second R&O* failed to balance eligibility restrictions applied to rural telephone companies against the mandate of Section 309(j). Such action does not constitute sustainable reasoned decision making. Accordingly, the Commission must reconsider its analysis.

The Commission purportedly bases “the need to restrict the opportunity of any class of service providers to obtain and use spectrum” on the determination of “whether the restriction is a necessary step in ensuring that consumers will receive efficient communications services at reasonable charges.”⁸ In making this assessment, the Commission relied exclusively on an analysis of competition.⁹ In performing this analysis, however, the Commission failed to specifically consider the characteristic of rural areas. Accordingly, the Commission’s market analysis is incomplete. There is simply no basis in the record for concluding that eligibility restrictions will ensure that rural populations receive LMDS at reasonable rates.

The Commission’s other justifications for imposing eligibility restrictions are equally misplaced and violative of Section 309(j) of the Act. The Commission reasons that “because rural LECs are generally small, they are unlikely to have the degree of overlap with BTAs

⁸ *Id.* at ¶ 157.

⁹ *Id.* at ¶¶ 157, 159.

necessary...to trigger our eligibility restriction.”¹⁰ This conclusion is purely speculative and unsupported by the record. Indeed, many of RTG’s members would be prohibited from holding LMDS licenses in the Basic Trading Areas (“BTAs”) containing the members’ telephone service areas. The Commission provides no information on the actual degree of overlap of rural telephone companies’ service areas and LMDS. Accordingly, the Commission’s conclusion is unsupported.

More importantly, a LEC’s size does not trigger the in-region restriction. The relative overlap of LMDS license area and wireline service area trigger the restriction.¹¹ Accordingly, the eligibility restriction prevents even a small rural telephone company from holding an LMDS license as long as 10 percent of the population of the LMDS license area is within the rural telephone company’s telephone service area. As discussed below, this restriction based on population becomes even more insurmountable in the context of partitioning.

In declining to adopt special provisions to benefit rural telephone companies, the Commission relies on partitioning as the method by which rural telephone companies will acquire LMDS spectrum.¹² The Commission argues that rural telephone companies that are unsuccessful in the LMDS auction:

will still have the opportunity to participate -- subject to the eligibility rules -- by either acquiring spectrum from an LMDS licensee through the partitioning and disaggregation rules we are adopting, or by contracting (in a way that does not circumvent any applicable ownership and control requirements and does not raise competitive concerns) with the LMDS licensee to provide service in its telephone market area.¹³

¹⁰ *Id.* at ¶ 180.

¹¹ *See* 47 C.F.R. § 101.1003(d).

¹² *Second R&O* at ¶ 362.

¹³ *Id.* at ¶ 180.

With its multitude of clarifications and limiting clauses, this supposed opportunity for rural telephone companies is vacuous. The Commission's significant overlap criteria render the Commission's partitioning rules useless for rural telephone companies. No matter how small the rural telephone company, its telephone service area will almost always exceed 10 percent of any partitioned LMDS service area. As RTG explained in its Reply Comments in response the *Fifth Notice of Proposed Rulemaking* ("FNPRM") accompanying the *Second R&O*, rural telephone companies realistically would be limited to partitioning LMDS licenses covering their wireline service areas and adjacent markets. A rural telephone company lacks the wherewithal to compete in markets geographically distant from its base of operations. The Commission giveth with one hand, and taketh away with the other.

In numerous new services, the Commission has relied on geographic partitioning as the only or primary "opportunity" for rural telephone companies to participate in the provision of such new service.¹⁴ RTG has repeatedly advised the Commission that such "opportunity" does not satisfy the mandate of Section 309(j) of the Act.¹⁵ Now, in the licensing rules for LMDS, the Commission has even eliminated partitioning as a meaningful opportunity by which rural telephone companies can participate.

¹⁴ See, e.g., Implementation of Section 309(j) of the Communications Act — Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532, 5597-9 (1994) ("*Competitive Bidding Fifth R&O*"); *In re Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees, Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 96-148, FCC 96-474 (rel. Dec. 20, 1996) ("*PCS Partitioning Order*").

¹⁵ See RTG's Comments and Reply Comments in response to Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees; Implementation of Section 257 of the Communications Act--Elimination of Market Entry Barriers, *Notice of Proposed Rulemaking*, WT Docket 96-148, GN Docket No. 96-113 ("*PCS Partitioning NPRM*").

The Commission also notes that a rural telephone company may acquire the 150 megahertz license. While RTG applauds the Commission's creation of this niche spectrum, it is widely agreed that there is not sufficient bandwidth to offer the core LMDS offerings such as video and telephony.¹⁶ Accordingly, this concession does not justify the in-region eligibility restriction for the 1,150 megahertz license, nor does it provide a meaningful opportunity to participate in the provision of true LMDS.

II. THE LMDS ELIGIBILITY RESTRICTIONS WILL HINDER THE PROVISION OF SERVICE TO RURAL AMERICA AND FRUSTRATE CONGRESSIONAL UNIVERSAL SERVICE GOALS

The Telecommunications Act of 1996 ("1996 Act") balances competition with other important national goals such as universal service and access to telecommunications services by persons with disabilities.¹⁷ The Act does not rely exclusively on unfettered competition as the sole means of ensuring that all Americans, including those with disabilities, and those residing in rural areas, have access to advanced telecommunications services. Congress directed the Commission to ensure that certain classes of people receive telecommunications service.

In so doing, Congress recognized the continuing role which rural telephone companies play in ensuring that all Americans, "including those residing in rural areas," have access to telecommunications services at reasonable rates.¹⁸ Congress determined that providing rural telephone companies with an opportunity to participate in the provision of new services is one method of ensuring that those services are rapidly deployed to rural America. Accordingly,

¹⁶ See *Second R&O* at ¶¶ 129, 182.

¹⁷ See 47 U.S.C. § § 254, 255.

¹⁸ See 47 U.S.C § 309(j)(3)(A).

Congress directed the Commission to ensure opportunities for rural telephone companies. The Commission is not free to ignore Congress's determination.

The *Second R&O*, however, adopts competition as its sole objective and the sole means of ensuring the deployment of LMDS. The Commission states,

[W]e do not believe that these restrictions, as crafted, will hinder the introduction of LMDS in rural areas....Therefore, if it is profitable to provide service to rural areas, a licensee should be willing to do so, either directly or by partitioning the license and allowing another firm to provide service.¹⁹

The Commission's statement is cavalier at best, and at worst demonstrates a disregard for the Commission's obligation to ensure that LMDS is disseminated to rural America. The Commission might just as well say, "If it is profitable to provide telecommunications service to Americans with hearing disabilities, someone will do so. If not, it is not our problem." The statement also demonstrates the Commission's fundamental misunderstanding of its obligations under Section 309(j). The Commission is not obligated to "not hinder" the introduction LMDS to rural areas. The Commission is obligated to ensure the prompt delivery of LMDS to rural areas. The *Second R&O*, however, lacks any specific finding that limiting rural telephone companies eligibility will "ensure the prompt deliver of service to rural areas."

In addition, there is simply no basis in the record to support the Commission's "prediction" that the exclusion of rural telephone companies will not hinder the deployment of LMDS to rural areas. As RTG advised the Commission in its comments in this proceeding, rural telephone companies and rural cable operators are in the best position to rapidly provide LMDS

¹⁹ *Second R&O* at ¶ 179-180.

to rural Americans.²⁰ By restricting their eligibility, the Commission will prevent the introduction of LMDS to rural areas.

The eligibility restrictions are especially crippling when coupled with the Commission's blind reliance on partitioning and the lack of meaningful performance requirements (described below) for LMDS systems. The "liberal performance requirements" provide no incentive for an LMDS license to partition its license, and the in-region restriction eliminates the best situated and most likely partitionee.

The Commission has come to rely on partitioning as a kind of panacea for delivering spectrum-based services to rural America.²¹ LMDS will be extremely capital intensive, and it would be extraordinarily difficult for a licensee to build-out and provide service to the population of the entire BTA, particularly to those persons residing in rural areas. In such circumstances partitioning might be a viable method to allow a licensee to indirectly deploy a service to rural areas. As RTG has previously advised the Commission, in reality, licensees are loath to partition their licenses. Licensees do not want to divide up their licenses in order to preserve the future value of a system if it is acquired by or merged with another company.

The Commission's lack of meaningful build-out requirements²² enhances a licensee's ability to warehouse spectrum and provides no incentive to encourage a licensee to provide

²⁰ See, e.g., Comments of Ad Hoc RTG (filed August 12, 1996); Reply Comments of Ad Hoc RTG (filed August 21, 1996); Reply Comments of RTG (filed May 6, 1997).

²¹ See, e.g. *PCS Partitioning Order*; Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service ("WCS"), GN Docket No. 96-228, *Report and Order*, FCC 97-50, (rel. Feb. 19, 1997) ("*WCS Order*").

²² As discussed in Section III, a licensee need only provide "substantial service" to the service area. The Commission has construed this requirement to mean that a licensee offering point-to-multipoint services need only demonstrate coverage of 20 percent of the population of its licensed area within 10 years. *Second R&O* at ¶ 270.

service to relatively higher cost areas. LMDS licensees can cherry pick the most lucrative markets within their licensed BTAs and hold rural areas hostage.

The in-region eligibility restrictions also render partitioning of little use for deploying LMDS to rural areas. In numerous proceedings, the Commission has recognized that rural telephone companies are ideally suited to provide new services to their rural service areas through the use of partitioning.²³ The *Second R&O*, however, prevents licensees from partitioning to rural telephone companies to serve areas related to their telephone service areas. While rural telephone companies may not be the only entities that would benefit from a partitioned LMDS license, they are in the best position to do so and the most likely to be able to construct and operate a system in a rural area. Accordingly, the eligibility restrictions severely limit the effectiveness of partitioning and ultimately hinder the deployment of LMDS to rural areas.

The eligibility restrictions also frustrate Congress's goal of ensuring universal service to all Americans at reasonable rates. The definition of what services must be included in universal service is continually changing.²⁴ Many of the service offerings contemplated for LMDS may be included in the definition of universal service. LMDS technology may also prove more economically viable for providing basic voice and video services to low density areas than copper, coaxial or fiber. At present, rural telephone companies are the sole carriers eligible to receive universal service support in their service areas. By denying rural telephone companies the ability to provide LMDS, the Commission will hinder its deployment to high cost rural areas.

²³ *Competitive Bidding Fifth R&O; PCS Partitioning Order.*

²⁴ *See Federal-State Joint Board on Universal Service, Report and Order*, CC Docket No. 96-45 (rel. May 8, 1997) ("*Universal Service Order*").

Accordingly, the Commission should reconsider its LMDS eligibility rules in light of the important goal of promoting universal service.

III. THE LACK OF PERFORMANCE REQUIREMENTS VIOLATES SECTION 309(J)(4)

In the *Second R&O*, the Commission failed to adopt meaningful build-out requirements for LMDS licensees. The Commission will only require licensees to provide “substantial service” to their service area within 10 years.²⁵ The Commission further explained that a licensee offering point-to-multipoint services would be considered to be providing substantial service if it demonstrated coverage of 20 percent of the population of its licensed area within 10 years.²⁶ This “performance requirement” does not satisfy the mandate of Section 309(j).

Section 309(j)(4)(B) of the Act requires the Commission to prescribe:

performance requirements, such as appropriate deadlines and penalties for performance failures, to ensure *prompt delivery of service to rural areas*, to prevent stockpiling or warehousing of spectrum by licensees or permittees, and to promote investment in and rapid deployment of new technologies and services.²⁷

The Act requires the Commission to ensure the rapid deployment to rural areas and to prevent the warehousing of spectrum. The Commission’s meaningless LMDS performance requirements provide no incentive to licensees to provide service to rural America. A licensee can easily meet the performance requirements by providing service only to the most densely populated city within its license area. The Commission concludes that performance requirements are basically

²⁵ *Second R&O* at ¶ 266.

²⁶ *Id.* at ¶ 270.

²⁷ 47 U.S.C § 309(j)(4)(B) (emphasis added).

unnecessary because a licensee, having purchased spectrum at auction, has demonstrated “its willingness to put the license to its best use.”²⁸

Sadly, the Commission’s economic theory utterly fails to satisfy Congress’s mandate that the Commission prescribe performance requirements that ensure the deployment of service to rural Areas. Section 309(j) makes no exception based on a licensee’s personal determination of what the “best use” of its spectrum is. The Commission’s market value theory provides no incentive to licensees to deploy LMDS to high cost rural areas and cannot be substituted for the clear intent of Section 309(j).

Amazingly, the Commission based its LMDS performance requirements on those adopted for the Wireless Communications Service (“WCS”).²⁹ The Commission’s reliance on the *WCS Order* is entirely inappropriate. WCS presented a unique and unfortunate service which Congress required the Commission to license and auction under an unreasonably expedited schedule.³⁰ No equipment exists for WCS, and no one is even sure what service will constitute WCS.³¹ With its back against the wall, the Commission was forced to license WCS under very nebulous terms with little guidance to licensee and no construction requirements to speak off. The Commission stated, “[C]onsidering the *unique circumstances* in which WCS licenses are being awarded and the strict technical requirements necessary to prevent interference, we will adopt very flexible build-out requirements for WCS.”³²

²⁸ *Second R&O* at ¶ 272.

²⁹ *Id.* at ¶ 267, citing *WCS Order*.

³⁰ *WCS Order* at ¶ 10. The Commission’s failure to raise even a pittance during the WCS auction demonstrates the fundamental problems with the licensing of WCS.

³¹ *Id.* at ¶ 111-113.

³² *Id.* at ¶ 111 (emphasis added).

LMDS, by contrast, is an existing service for which equipment already exists.³³ There are no unique circumstances analogous to the WCS licensing scheme. LMDS licensees can and should begin providing some form of service on a rapid basis. It is true that the nature of LMDS may evolve over time, but that is not an excuse to delay the introduction of LMDS to the public. As RTG argued before the FCC in WCS proceeding, WCS should be treated as a white elephant, and not as blue print for the licensing of one of the largest blocks of spectrum ever licensed -- 1,300 megahertz of spectrum.

The Commission argues that its performance requirements satisfy the mandate of Section 309(j) because partitioning will promote service to rural areas.³⁴ As noted above, the in-region eligibility restrictions eviscerate partitioning as a viable method of deploying LMDS to rural areas.

In the *Second R&O*'s discussion of build-out requirements, the Commission also argues that the universal service policies of the 1996 Act will promote the deployment of LMDS to rural areas thus alleviating the need for strict build-out requirements.³⁵ This statement is inherently contradictory and puzzling. As noted above, rural telephone companies currently are the only eligible carriers to receive universal service support in their telephone service areas, but rural telephone companies are *not eligible* to hold LMDS licenses in their telephone service areas. How then will universal service policies ensure the rapid deployment of LMDS to rural areas? Under the current regulatory scheme, they will not.

³³ See *Second R&O* at ¶¶ 5, 130.

³⁴ *Id.* at ¶ 272.

³⁵ *Id.* at note 403.

Because the “liberal performance requirements” adopted in the *Second R&O* do not satisfy the mandate of Section 309(j), the Commission should reconsider and revise them. Several parties to this proceeding proposed performance requirements for LMDS based on the successful cellular model.³⁶ Under this approach a licensee would have a limited amount of time to claim its service area. Thereafter, unserved areas would be opened for licensing. This approach would encourage licensees to provide service to a greater percentage of their service areas, and would provide an incentive for them to partition out areas that they do not intend to serve directly. Most importantly, this approach would curtail a licensee’s ability to hold rural areas hostage. The Commission should reconsider its decision to reject this approach.

CONCLUSION

The imposition of in-region eligibility restrictions on rural telephone companies violates Section 309(j) of the Act. These restrictions deny rural telephone companies a meaningful opportunity to participate in the provision of LMDS and hinder the deployment of LMDS to rural areas. The eligibility restrictions also conflict with the Congress’s universal service goals and are

³⁶ See, e.g., *id.* at note 398 and accompanying text.

legally unsustainable. Accordingly, the Commission should reconsider and eliminate the in-region restrictions on a rural telephone company's eligibility to own and operate an LMDS system.

Respectfully submitted,

THE RURAL TELECOMMUNICATIONS GROUP

By: 

Caressa D. Bennet
Gregory W. Whiteaker

Bennet & Bennet, PLLC
1019 Nineteenth Street, NW
Suite 500
Washington, D.C. 20036
(202) 530-9800

Its Attorneys

May 29, 1997

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CERTIFICATE OF SERVICE

I, Jacqueline Jenkins, an employee in the law firm of Bennet & Bennet, PLLC, hereby certify that a copy of the foregoing "Petition for Reconsideration" has been served on the following via first class, U.S. postage pre-paid mail this 29th day of May, 1997:

Chairman Reed Hundt*
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner James H. Quello*
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Rachelle Chong*
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Susan Ness*
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Gretchen Rubin*
Office of Chairman Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Rudy Baca*
Office of Commissioner Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Suzanne Toller*
Office of Commissioner Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

David Siddall*
Office of Commissioner Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Dan Phythyon, Acting Chief*
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

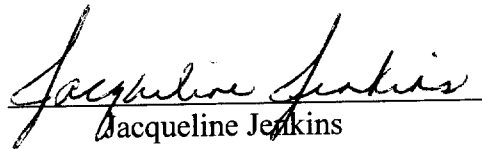
ITS*
Federal Communications Commission
1919 M Street, N.W., Room 246
Washington, D.C. 20554

United States Telephone Association
David Cohen
Keith Townsend
1401 H Street, NW, Suite 600
Washington, DC 20005-2164

National Telephone Cooperative Association
David Cosson
L. Marie Guillory
2626 Pennsylvania Avenue, NW
Washington, DC 20037

OPASTCO
Lisa Zaina
Ken Johnson
21 Dupont Circle, Suite 700
Washington, DC 20036

Stephen G. Kraskin
Sylvia Lesse
Kraskin & Lesse
2120 L. Street, NW Suite 520
Washington, DC 20037
Counsel for:
The Independent Alliance



Handwritten signature of Jacqueline Jenkins in cursive script, underlined.

* via hand delivery

V:\DOCS\LMDS\PETRCO7.529